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No. 01-1435

In The

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH WELLS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

CRAIG A. CRISPIN
Counsel of Record
CRISPIN & ASSOCIATES – EMPLOYMENT LAWYERS
500 Plaza West, 9600 SW Oak Street
Portland, Oregon 97223-6597
(503) 293-5759

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE QUESTION PRESENTED

Whether when physicians elect the corporate form of business structure with its attendant responsibilities and benefits and enter into employment contracts with the corporation, the employee-shareholders should be counted as employees for purposes of determining whether the corporate employing entity is amenable to an action under the ADA by an admitted employee.

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OTHER AUTHORITIES:

Eaton, 17-17F BUSINESS ORGANIZATIONS: PROFESSIONAL CORPORATIONS AND ASSOCIATIONS, Matthew Bender (1998) 25

I W. Fletcher, Cyclopedia of the Law of Private Corporations § 14 at 432 (rev. ed. 1999) 25

Klein, et al., AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES, Foundation Press 2001 ..... 25, 26

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STATEMENT OF THE CASE

Factual Background

Respondent Wells ("Wells") was employed by petitioner medical clinic (the "Clinic") from 1986 until her termination in May 1997. J.A. 12. Wells suffers from mixed connective tissue disorder, a debilitating and life-threatening disorder. J.A. 13.

Wells made several requests for reasonable accommodation to permit her to fulfill the essential functions of her position as the Clinic's Bookkeeper. J.A. 14, 15, 79. In April 1997 the Clinic demoted Wells to a receptionist position in an office location several miles from Wells' home, with the knowledge and expectation that Wells would be unable to perform the work at such location and with the purpose of forcing plaintiff to quit. *See* J.A. 77.

When Wells protested the discriminatory transfer, the Clinic's Administrator suggested Wells voluntarily quit by saying at least twice: "So, are you quitting then?" J.A. 80. Because of petitioner's discriminatory treatment, Wells suffered an exacerbation of her medical condition and became unable to work. She consulted her physician, who took her off work *through* May 12, 1997. Wells provided a copy of the medical release to the Clinic. J.A. 80.

Despite the medical release extending *through* May 12, 1997, the Clinic communicated to Wells by letter dated May 6, 1997 that she would be terminated if she did not return to work *by* May 12, 1997, and further provided COBRA forms to Wells containing a termination date of May 12, 1997. J.A. 80-81.

On May 12, 1997, Wells provided the Clinic with an extended medical authorization to be off work. J.A. 81.

Despite such notice, the Clinic terminated Wells' employment, purportedly for her failure to report to work. J.A. 16. Wells could have continued to work with the medical clinic had it provided the reasonable accommodations sought by Wells and had her condition not exacerbated due to the conduct of the Clinic's Administrator. J.A. 82.

Petitioner is a professional corporation. J.A. 12, 21. The five physician shareholders are employees of the corporation, working under employment agreements. J.A. 66, 71. When added to the 13 to 14 employees regularly employed by petitioner other than physicians, the number of employees readily exceeds that required to bring petitioner under coverage of the ADA. J.A. 55-62.

Introduction to the Legal Issues

The Americans with Disabilities Act of 1990 ("the ADA"), 42 U.S.C. § 12112(a), makes it unlawful to discriminate against disabled "employees" or against prospective "employees" who are otherwise qualified for a job. The plain text of the ADA imposes jurisdiction over employers with 15 or more employees. 42 U.S.C. § 12111(5)(A). The ADA is but one of several federal employment laws that confer protections on "employees." For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prohibits discrimination against "employees" on the basis of race, religion, sex or national origin and protects only employees of those employing entities with at least 15 employees. *See also* 29 U.S.C. § 630(b) (Age Discrimination in Employment Act, 20 or more employees). The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), prohibits employers from paying differing wages to "employees" on the basis of their sex, and the Family and Medical Leave Act, 29 U.S.C.

§§ 2611(2)-(3), 2617, confers certain rights to take leave on "employees."[1]

The determination of what constitutes an employee, and the distinction between employees, partners, and owners, when such a distinction is relevant, is critical to the applicability of this array of federal employment provisions. Moreover, "[a]ll 50 states, the District of Columbia, and Puerto Rico have adopted in some form laws prohibiting discrimination in employment based on disability." I B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 266 (3d ed. 1996). These state laws also typically apply only to "employees." Resolution of the issue presented in this case has the potential to determine the reach of a vast body of state law.

The Question of What Constitutes an *Employee* Arises in Different Contexts

The question of what constitutes an *employee* for purposes of these remedial statutory protections arises in different contexts. Sometimes, the distinction must be made to determine whether a person performing services for an employing entity is an employee protected by employment discrimination laws versus an independent contractor not enjoying such protection. *See Nationwide Mutual Ins. Co. v. Darden,* 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). Similarly, an employing entity may argue that a person performing services, but not

---

[1] In general, cases construing definitions of one of the Acts are to be viewed as persuasive authority when interpreting the others. *See Lorillard v. Pons,* 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978).

seeking to invoke the relevant statute, is an independent contractor for the purpose of limiting its number of employees, thereby escaping coverage of the relevant statute for a claim asserted by an undisputed employee.

Other times, when the employing entity is a partnership, the employing entity argues that a person performing services is not an employee but rather is a partner. If a partner, the argument goes, the individual is not an *employee* for purposes of statutory protection. If an admitted employee is claiming the protection of the statute, the partner, it is argued, should not be counted in determining the threshold number of employees for coverage under the Act.

The partner is analogized to an owner, a status inconsistent with that of *employee.* A partner asserting a discrimination claim against the employing entity is said effectively to assert a claim against himself or herself as such an *owner. See, e.g., E.E.O.C. v. Sidley Austin Brown & Wood,* 2002 WL 31387525 *5 (7th Cir. Oct. 24, 2002) ("partnership relations would be poisoned if partners could sue each other for unlawful discrimination"); *Matinchek v. John Alden Life Insurance Co.,* 93 F.3d 96, 101 (3d Cir. 1996) (ERISA, referring to employee acting as an employer threatening to take away his or her own benefits); *Simpson v. Ernst & Young,* 100 F.3d 436, 445 (6th Cir. 1996) (Daughtry, C.J., concurring), *cert. denied,* 520 U.S. 1248 (1997).

In the context of an employing entity formed as a professional corporation, the corporation sometimes argues that its shareholder-employees or director-employees – often lawyers, accountants, physicians, or other professionals – are in "economic reality" partners and as such may not assert a

claim as *employees* under relevant discrimination statutes. *See, e.g., Hyland, M.D. v. New Haven Radiology Associates, P.C.,* 794 F.2d 793 (2d Cir. 1986). Also, as with other forms of employing entities, a professional corporation may argue that its shareholder-employees should be treated as partners to establish that it has an insufficient number of employees for coverage of the relevant employment discrimination law. *See, e.g., E.E.O.C. v. Dowd & Dowd, Ltd.,* 736 F.2d 1177 (7th Cir. 1984).

In each context, then, the question of employee status must be addressed for purposes of determining who can sue as well as who can be sued.

Summary Of Arguments

The Ninth Circuit correctly determined that when an employing entity elects the corporate form of organization, all the corporate entity's employees are *employees* for purposes of determining the number of employees under 42 U.S.C. § 12111(5)(A).

The purpose of imposing a minimum number of employees for ADA coverage is to spare small employers the expense and inconvenience of compliance. When an employing entity has more than the threshold number of participants, whether members or employees, as does the Clinic corporation here, the reason for withholding coverage from small employers no longer holds force.

The statutory language does not permit a conclusion that shareholder employees are anything other than employees. The Clinic and EEOC argue in favor of a model requiring the analysis in virtually every case whether one or more of the shareholder employees is in sufficient

"economic reality" as to be considered a *partner* and thereby an *employer* or *owner* despite his de jure status as an employee of the corporation. Partnerships are the banding together of individual partners. The difference between partnerships and professional corporations is that the corporation has a legal existence separate and apart from its shareholders. Because the Clinic here is not a partnership, but rather a corporation with an independent and distinct legal existence, the inquiry into *partnership* status of the shareholder employees is misplaced.

The Clinic urges the court to ignore the form of business its incorporators and shareholders freely chose. This is not form over substance. The form freely adopted by the employer establishes the substantive nature and rights of the employing entity. *Wells v. Clackamas Gastroenterology Associates, P.C.*, 271 F.3d 903, 905 (9th Cir. 2001). The corporation is a distinct legal entity, different from those who create and own it. The Clinic could have selected a number of other forms of business structure, but elected to form a corporation. Having elected to exist as a corporation, with corporate employees rather than partners, an employing entity such as the Clinic should be held to that election. The shareholder employees of the Clinic work under formal employment agreements with the employing corporation and perform traditional employee duties as part of the Clinic's services to the public. The substance of the form of enterprise selected by the Clinic is that the corporation's servants are substantively employees, even if also shareholders.

Once a business entity elects the corporate form, it undertakes certain obligations, including the duty to observe corporate formalities, file corporate income taxes, and otherwise act as a corporation. Having freely chosen

the corporate form, the employing entity is the corporation, and the corporation's employees cannot be other than employees under the relevant statutory language. As such, they are employees for purposes of ADA coverage for Wells' claims against the Clinic.

The Ninth Circuit correctly determined that when an employing entity elects the corporate form of organization, all the corporate entity's employees are *employees* for purposes of determining the number of employees under 42 U.S.C. § 12111(5)(A). The dissenting judge below argues that under the majority holding two medical clinics, identical in size in every respect, would be treated differently for ADA Title I coverage because of business form. If that is so, it is exactly why this Court should hold that employees of professional corporations are, in substance and in form, employees of the employing corporate entity, thereby providing clear guidance to small firms about the potential effect of electing the advantages of the corporate form of organization.

The position of the dissenting judge below, and of the United States and the Equal Employment Opportunity Commission, results unnecessarily in the exclusion from protection of individuals especially vulnerable to the kinds of discriminatory practices the federal employment statutes were designed to prevent. The EEOC focuses on "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." Adoption of this test will cause an explosion in arguments that one or more individuals within the defendant employing entity has some independence and role in managing the organization, and thereby should be excluded from a status as "employee" under the Act. The application of an

economic realities test to an ever widening range of shareholders and possibly others with some degree of management responsibility, as the EEOC's position will permit, will engender the need to apply an economic realities case in all but the clearest cases, imposing upon the already overburdened district courts an added burden.[2]

This Court should adopt an analytical model that takes into account the purpose for which bona fide *partners* are excluded from protection of federal employment statutes, yet operates to *include* rather than *exclude* those persons who are, without serious question, *employees*. This can be done by focusing on which specific part of the statutory definition is at issue at any given time, and resolving employee status accordingly.

Employers are best served by a test that gives them a ready benchmark for their obligations relating to federal employment statutes, without resort to complex legal analysis of facts and to the different possible interpretations which may be placed on them. Such predictability results from a test that addresses first and primarily whether the question of employee status arises in connection with a claim asserted by an admitted employee. If so, then the question is merely how many employees (including shareholders and any others with ownership interests) does the employing entity employ. If that number satisfies the requisite number of employees for application of the

[2] Defendants may attempt to pick and choose from among employees on the payroll, challenging their status, their days of earning pay, and whether they own shares in the corporate stock, and even arguing that an individual is an employee for one purpose and an employer for another.

relevant federal employment statute, then the employer will know that it must comply with the obligations imposed by the relevant statute.

ARGUMENT

I. THE DECISION TO INCORPORATE MEANS THAT ALL EMPLOYEES OF THE CORPORATION, REGARDLESS OF SHAREHOLDER STATUS, ARE "EMPLOYEES" FOR PURPOSES OF DETERMINING THE CORPORATION'S SUBJECTIVITY TO SUIT AS AN *EMPLOYER*

A. The Clinic's Shareholder-Employees are Employees, not Partners

The Ninth Circuit properly concluded that the statutory language requires consideration of the number of employees, not whether or not those employees might have some attributes of partners. J.A. 101. The statutory language does not permit a conclusion that shareholder employees are anything other than employees, particularly when applied in the context of an admitted employee seeking to bring a claim against the employing entity.

In *Hyland, M.D. v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2nd Cir. 1986) (ADEA case), the court wrote:

> The fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation, however, is not reason for ignoring a form of business organization freely chosen and established. * * * Having made the election to incorporate, [the physician members of NHRA] should not now be heard to

> say that their corporation is 'essentially a medical partnership among co-equal radiologists.'
>
> It is one thing to apply an economic realities test to distinguish an employee from an independent contractor or partner, but it is quite another to apply the test in an attempt to identify as partner one associated with a corporate enterprise. While those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive.

Id. 794 F.2d at 798. *Accord Gorman v. North Pittsburgh Oral Surgery Associates, Ltd.,* 664 F. Supp. 212, 214 (W.D. PA. 1987) ("The professional corporation enjoys a unique existence among business combines, being a corporation for liability and tax purposes but a partnership in other respects. *It enables a professional to employ him or herself and that is the only economic reality with which we need be concerned.* We hold that the shareholders of NPOSA are employees of the professional corporation for ADEA purposes." (Emphasis supplied)); *see also E.E.O.C. v. Johnson & Higgins, Inc.,* 91 F.3d 1529 (2d Cir. 1996).[3]

It is undisputed that the five physicians associated with petitioner are employees, working under employment

[3] Shrewd decisions of the form of business entity require sophisticated analyses of the costs and benefits involved. These differences are like any business decision – economic in nature. The dissent below equates the minimum employee requirement as economic in nature. As such, the form of entity is of proper consideration when assessing liability.

agreements. When added to the 13 to 14 employees otherwise admitted by the medical clinic, the number of employees readily exceeds that required to bring petitioner under coverage of the ADA.

B. Corporations, Unlike Partnerships, Exist Separate and Apart from Shareholders

The plain text of the ADA imposes jurisdiction over employers with 15 or more employees. 42 U.S.C. § 12111(5)(A). The Clinic argues the Court should examine whether the corporate shareholder-employees here should be treated not as employees, as they necessarily are, but rather as if they were *not employees* at all. The Clinic's analysis relies on cases involving partners and excluding partners from the number of an employing entity's employees. In the context of a corporation, such analysis is inappropriate.

It has generally been accepted that the employment discrimination laws cover "employees" only and exclude bona fide partners. The common reasoning for excluding partners is that partners are co-owners of a business who are jointly engaged in an entrepreneurial venture. The federal employment laws were not intended as a vehicle for co-owners to resolve disputes over how to conduct their business. *See, e.g., Sidley Austin Brown & Wood,* 2002 WL 31387525 at *5; *Matinchek,* 93 F.3d at 101; *Simpson,* 100 F.3d at 445 (Daughtry, C.J., concurring).

In *Hishon v. King & Spaulding,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), this Court considered a Title VII claim of sex discrimination brought by an associate of a law firm organized as a partnership. The Court noted that the plaintiff's complaint sufficiently alleged that the

partnership employing entity was an employer for purposes of Title VII. Once the partnership entered into "a contractual relationship of employment" with the plaintiff, the protections of Title VII attached. *Id.* at 74.

In his concurring opinion in *Hishon,* Justice Powell took pains to express his understanding that the Court's opinion did not extend the protections of Title VII "to the management of a law firm by its partners." *Id.* at 79. Justice Powell emphasized that the Court's opinion did not "require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply." *Id.*

> The relationship among law partners differs markedly from that between employer and employee – including that between the partnership and its associates. The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects. The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement or consent among the partners.

Id. at 80 (Powell, J., concurring) (footnotes and citation omitted).

In a footnote to the passage quoted just above, Justice Powell described the "sensitive decisions" required of the partners:

> These decisions concern such matters as participation in profits and other types of compensation; work assignments; approval of commitments in bar association, civic, or political activities; questions of

> billing; acceptance of new clients; questions of conflicts of interest; retirement programs; and expansion policies. Such decisions may affect each partner of the firm. Divisions of partnership profits, ***unlike shareholders' rights to dividends,*** involve judgments as to each partner's contribution to the reputation and success of the firm. This is true whether the partner's participation in profits is measured in terms of points or percentages, combinations of salaries and points, salaries and bonuses, and possibly in other ways.

Id. at 80 n.3 (Powell, J., concurring) (emphasis supplied).[4]

The Seventh Circuit interpreted Justice Powell's comments in *Hishon* as "saying that a traditional law partnership, involving 'the common conduct of a shared enterprise' and a relationship among the partners that 'contemplates that decisions will be made by common agreement or consent among the partners,' has a governance structure different from the one contemplated or assumed by Title VII." *E.E.O.C. v. Sidley Austin Brown & Wood,* 2002 WL 31387525 at *9. That court explained further that "[a]t the same time he was making clear that labeling an enterprise that does not have the structure, the character, of the traditional partnership will not immunize it from the statute." *Id.*

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[4] Justice Powell is not the only one to expressly compare, in this context, the corporate structure as different from a partnership. *See, e.g., Trainor v. Apollo Metal Specialties Inc.,* ___ F.3d ___, 2002 WL 31781136 (10th Cir. Dec. 13, 2002); *Hishon v. King & Spaulding,* 678 F.2d 1022, 1028 (11th Cir. 1982) (emphasis supplied), *reversed on other grounds,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

Partnerships are the banding together of individual partners. A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses." *Commissioner of Internal Revenue v. Tower,* 327 U.S. 280, 286, 66 S.Ct. 532, 535, 90 L.Ed. 670 (1946); *Commissioner of Internal Revenue v. Culbertson,* 337 U.S. 733, 740, 69 S.Ct. 1210, 93 L.Ed. 1659 (1949). Similarly, section 6 of the Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."[5]

The critical difference between partnerships and professional corporations is that the corporation has a legal existence separate and apart from its shareholders. Because the Clinic here is not a partnership, but rather a corporation with an independent and distinct legal existence,

[5] In *Serapion v. Martinez,* 119 F.3d 982 (1st Cir. 1997), the First Circuit rejected the argument that all individual partners were employees of the partnership under Puerto Rico law:

> We also reject a variation on the *per se* theme advanced by the appellant. She asseverates that, due to the peculiarities of Puerto Rico's civil law structure, all partners in all Puerto Rico partnerships must be considered employees for purposes of Title VII. In a civil law system, this theory goes, a partnership is not merely a banding together of individual partners but a separate entity which must itself be considered the employer of all the individual partners.

Id. at 988. The *Serapion* court did not resolve the question under Puerto Rico law, instead concluding that it was "enough for our purposes that the construct is unsound as a matter of *federal* law * * * *: [W]hether an individual is an employee for purposes of Title VII is a matter of federal law, and the question must be answered with reference to principles of federal law."

the effort to focus on the *partnership* status of the shareholder employees is misplaced.

C. The Corporation Medical Clinic is not a Partnership and The Corporate Form of Business Structure Selected by the Clinic Should Not be Ignored

When *partners* are the subject of examination, the question is different from that presented in this case. Partners typically are not employees of the partnership. In contrast, corporate employees, even if shareholders, necessarily *are* employees of the corporation.[6]

The Tenth Circuit recently addressed the employee status of one of two equal shareholders of the employing entity, virtually the same issue now before the Court in this matter. *Trainor v. Apollo Metal Specialties Inc.,* ___ F.3d ___, 2002 WL 31781136 (10th Cir. Dec 13, 2002). In *Trainor,* the district court granted summary judgment to the employer, holding it was not appropriate to classify the

[6] Arguing that shareholder employees should be treated as if they were partners might have some logical force if one of these employee-shareholders were here attempting to sue the corporate entity. In such a case, in a closely held corporation, an action by an owner against himself or herself could create certain difficulties. But even in such a case, shareholder disputes with the corporate entity arise in a variety of circumstances, such as in contract disputes, compensation issues, and other claims. *See generally E.E.O.C. v. Pettigrove Truck Service, Inc.,* 716 F. Supp. 1430 (S.D. FL. 1989).

The courts are competent to resolve these issues. Whatever difficulties might exist in subjecting a corporation to suit by an employee-shareholder are insufficient to ignore the plain text of the Act in its reference to "employees," particularly when those difficulties are not involved at all in an action by this plaintiff, a lower-level employee.

50% shareholder, a Mr. Pilgrim, as both an owner and an employee. In reversing the district court, the Circuit Court first recognized the remedial purposes of federal employment statutes:

> "In our review of the antidiscrimination laws we must be mindful of their remedial purposes, and liberally interpret their provisions to that end." Wheeler v. Hurdman, 825 F.2d 257, 262 (10th Cir. 1987). "Such liberal construction is also to be given to the definition of 'employer,'" Owens v. Rush, 636 F.2d 283, 287 (10th Cir. 1980) (internal quotation omitted), and the term "employee," see Chavero v. Local 241, 787 F.2d 1154, 1156 (7th Cir. 1986) (per curiam).

Id. at *5.

Examining the employee status of the 50% shareholder, the court explained "Mr. Pilgrim and his wife currently own in equal shares all the stock of Apollo[;] Mr. Pilgrim performed services for Apollo[;] and * * * Apollo [the employing entity] paid him a salary for those services. *Mr. Pilgrim was thus both an owner of Apollo and a participant in a traditional employment relationship with the corporation.*" *Id.* at *6 (emphasis supplied).

The circuit court examined *Serapion v. Martinez,* 119 F.3d 982 (1st Cir. 1997), where the court concluded that a senior or proprietary partner was not an employee of the partnership, noting the factual analysis that court applied to determine whether a putative partner actually was sufficiently close to an employee to be covered by Title VII. The *Trainor* court concluded that even if the factors examined in *Serapion* were possibly relevant to evaluating whether a corporate shareholder should also be considered an employee, "the differences between a shareholder of a

corporation and a partner in a partnership * * * may well compel a different result when the relevant factors are assessed." *Trainor,* 2002 WL 31781136 at *5.

The *Trainor* court distinguished *Chavero v. Local 241,* 787 F.2d 1154, 1156 (7th Cir. 1986) (per curiam), where the court held that the members of the union's executive board of directors were not union *employees* for purposes of Title VII coverage. It recognized that "the term 'employee' does not include persons 'who are no more than directors of a corporation or unpaid, inactive officers.'" *Trainor,* 2002 WL 31781136 at *6. The court continued in describing the *Chavero* result: "Nevertheless, the court took care to point out that a director 'may accept duties that make him also an employee,' and that 'the primary consideration is whether an employer-employee relationship exists.'" *Trainor,* 2002 WL 31781136 at *6. "To the extent that *Chavero* is relevant, therefore, it supports the conclusion that Mr. Pilgrim is an Apollo employee because he performs traditional employee duties as part of an employment relationship." *Id.*

The same conclusion obtains here. The shareholder employees of the Clinic work under formal employment agreements with the employing corporation and perform traditional employee duties as part of the Clinic's services to the public. As such, they are employees for purposes of ADA coverage for Wells' claims against the Clinic.

The *Trainor* court concluded that "partnerships are not analogous to corporations." In evaluating shareholder employee status, as with director employees, "[T]he

primary consideration is whether an employer-employee relationship exists" in which the director "perform[s] traditional employee duties."[7] Although "it may be true that Mr. Pilgrim did not answer to anyone but himself in performing his services for Apollo, we do not think this factor is dispositive in light of the undisputed evidence of his employment relationship with the company." *Id.* 2002 WL 31781136 at *9.

[7] The *Trainor* court also considered the following:

"[T]he primary consideration is whether an employer-employee relationship exists" in which the director "perform[s] traditional employee duties." *Chavero,* 787 F.2d at 1157; *Walters v. Metro. Educ. Enter., Inc.,* 519 U.S. 202, 212 (1997) ("the ultimate touchstone under § 2000e(b) is whether an employer has employment relationships with 15 or more individuals"); *see also Whitaker House Coop.,* 366 U.S. at 32 (members in cooperative are also employees when cooperative provided opportunity to work and paid for it); *Graves v. Women's Prof. Rodeo Ass'n,* 907 F.2d 71, 72-73 (8th Cir. 1990) (members of corporation not employees because they did not receive compensation for services and therefore did not have employment relationship with corporation); *Zimmerman v. N. Am. Signal Co.,* 704 F.2d 347, 351-52 (7th Cir. 1983) (corporate officers who were paid for their services and worked for corporation deemed employees, while officers who were unpaid and took no role in corporate daily affairs were not considered employees), *overruled on other grounds by Walters v. Metro. Educ. Enter., Inc.,* 519 U.S. 202 (1997); *E.E.O.C. v. First Catholic Slovak Ladies Ass'n,* 694 F.2d 1068, 1070 (6th Cir. 1982) (association directors were also employees when they performed traditional employee duties and drew salaries)."

Trainor v. Apollo Metal Specialties Inc., ___ F.3d ___, 2002 WL 31781136 •9 (10th Cir. Dec. 13, 2002).

Reasoning that partners are not employees, the Eleventh Circuit distinguished employees of a corporation as different and distinct from partners:

> [T]he partners own the partnership; they are not its 'employees' under Title VII. ***We find a clear distinction between employees of a corporation and partners of a law firm.*** In making this distinction, we do not presume to exalt form over substance. In this instance, however, the form is the substance, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. The very essence of a partnership is the voluntary joinder of all partners with each other.

Hishon v. King & Spaulding, 678 F.2d 1022, 1028 (11th Cir. 1982) (emphasis supplied), *reversed on other grounds,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

II. THE DISSENT BELOW OFFERS NO COMPELLING RATIONALE FOR AN ECONOMIC REALITIES TEST

The dissenting judge below cautions against embracing the word *corporation* as the end of the inquiry. Instead, she urges that the correct approach is to examine the relationships of shareholders with their clientele. In doing so, the dissenting judge notes that under Oregon law physician shareholders are jointly and severally liable to their clientele, similar to a partnership, and unlike a corporation. As such, she concludes, shareholders of professional corporations should be considered more like partners. J.A. 107.

The dissenting judge's summary is limited in scope and incomplete. The case at hand does *not* concern the

relationship of the shareholder employees to the professional services rendered; it examines how an employer treats its employees. The dissent's examination of state law is not particularly helpful if, as the court held in *Serapion,* the question whether an individual is an employee for purposes of the federal employment statutes is a matter of federal, not state, law. 119 F.3d at 988-89.

Even if state law is relevant, a more complete examination of the professional corporation and partnership forms of business demonstrates significant differences between the two. While shareholders of a professional corporation are jointly and severally liable for acts rendered in the specified professional service of the corporation, they are *not jointly and severally liable* for acts not so associated. Ore. Rev. Stat. § 58.185. Partners are liable, jointly and severally, for all obligations of the partnerships, including employment agreements. Ore. Rev. Stat. § 67.105.

Other significant differences that enter into the decision of which entity to form include formation, duties, and dissolution. The Oregon Business Corporation Act applies to professional corporations where it does not conflict with the professional corporation Act. Ore. Rev. Stat. § 58.045. Like any corporation, professional corporations are required to file papers with the Secretary of State, conduct regular meetings, have a board of directors, submit articles of incorporation, and distribute shares. *See* Ore. Rev. Stat. § 60.100-60.992. Oregon courts are authorized to take significant actions against the board of directors

when a suit is brought by a shareholder.[5] These actions include prohibiting, or setting aside, any action of the corporation, removing a director from office, appointing an individual as a director or officer, demanding an accounting with respect to the matter in dispute, and issuing distributions of shares. Ore. Rev. Stat. § 60.952.

Partnerships do not operate under such formalities. A partnership is created when two or more persons agree to carry on as co-owners a business for profit whether or not the persons intend to create the partnership; no filing is necessary. Ore. Rev. Stat. § 67.055. Partnerships are not required to have a structured board of directors or conduct regular meetings.

Whereas shareholders of a professional corporation may sell their shares, or indeed their entire interest, a partner may freely transfer only the partner's share of profits, losses, and distributions. Ore. Rev. Stat. § 67.195. A partner may dissociate from a partnership, but may be liable for damages caused by a wrongful dissociation. Ore. Rev. Stat. § 67.225. Finally, partners owe a duty of loyalty and a duty of care to the partnership. Ore. Rev. Stat. § 67.155.

The dissent also refers to the reasoning behind Title I's fifteen employee coverage requirement as imposed to spare small firms like medical practice groups from the expense of the employment anti-discrimination laws.

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[5] Professional corporations may have shareholders that are not professionals. "The holders of a majority of each class of shares entitled to vote shall be physicians who are licensed in this state to practice medicine." Ore. Rev. Stat. § 58.375.

Under the majority holding, she argues, two medical clinics, identical in size in every respect, would be treated differently for ADA Title I coverage because of business form. J.A. 107.

That may be so, but that is exactly why this Court should hold that employees of professional corporations are, in substance and in form, employees of the employing corporate entity, thereby providing clear guidance to small firms about the potential effect of electing the advantages of the corporate form of organization. Such an election carries both benefits and obligations, and an incorporating employing entity should not expect to have one without the other.

III. PETITIONER SHOULD BE HELD TO ITS ELECTION TO INCORPORATE

The Clinic urges the court to ignore the form of business its incorporators and shareholders freely chose. This is not a "form over substance" problem. The substance of the form of enterprise selected by the Clinic is that the corporation's servants are substantively employees, even if also shareholders.[9]

[9] Some courts have focused upon the conflict that arises when shareholders or partners bring a claim against the employing entity, within which they may or do exert decision-making authority and in which they may or do have a direct stake in the financial impact a successful claim could cause. Those cases raise different analytical problems, as do cases involving the distinction between employees and independent contractors. It is one thing to determine that an owner of a business entity should be precluded from suing the entity he or she owns. It is yet another to determine that a lower level employee should

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The corporation is "a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who create it, who own it, or whom it employs." *Cedric Kushner Promotions v. King,* 533 U.S. 158, 163, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001). The Clinic could have selected a number of other forms of business structure, but elected to form a corporation. The Clinic could have elected the partnership model, but did not. It elected instead to become a corporation, which under the law is a separate and distinct legal entity. *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 17 U.S. 518, 636, 4 L.Ed. 629 (1819).

Having elected to exist as a corporation, with corporate employees rather than partners, an employing entity such as the Clinic should be held to that election. As the Ninth Circuit's Opinion below stated:

> Given the broad purpose of the ADA, see 42 U.S.C. § 12101, we find Hyland's reasoning to be considerably more persuasive than Dowd's. Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination.

be deprived the protection of employment discrimination laws by excluding shareholders who have affirmatively elected to be employees of their professional corporation.

Wells v. Clackamas Gastroenterology Associates, P.C., 271 F.3d at 905.

Indeed, "There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961) (shareholders in knitwear cooperative held to be employees under FLSA).[10] Under the Restatement (Second) of Agency:

> [F]ully employed but highly placed employees of a corporation, such as presidents and general managers, are not less servants because they are not controlled in their day-to-day work by other human beings. Their physical activities are controlled by their sense of obligation to devote their time and energies to the interests of the enterprise.

Id., ch. 7, topic 2, title B, introductory note at 479. Indeed, "A corporation and its shareholders are presumed separate

[10] In a variety of situations applying a remedial statute calling for the interpretation of the term "employee," an individual's status as a major stockholder, officer or director of a corporation has been found to be compatible with his or her status as an employee. *See, e.g., Zimmerman v. North American Signal Co.*, 704 F.2d 347, 350-54 (7th Cir. 1983) (ADEA plaintiff, a corporate vice president and one-third shareholder, considered as employee); *E.E.O.C. v. First Catholic Slovak Ladies Association*, 694 F.2d 1068, 1070 (6th Cir. 1982) (officer-directors held entitled to ADEA protections); *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235, 1261 (3d Cir. 1978) (person holding positions of secretary and director held an employee for Title VII purposes), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); *Hoy v. Progress Pattern Co.*, 217 F.2d 701, 704 (6th Cir. 1954) (one-eighth shareholder, vice president, director and chairman of board may be employee within purview of FLSA).

and distinct, whether the corporation has many shareholders or only one." I W. Fletcher, Cyclopedia of the Law of Private Corporations § 14 at 432 (rev. ed. 1999).

Nonetheless, the Clinic urges this Court to ignore the form of business it freely chose. The Ninth Circuit was correct in deciding that a corporation is a corporation. The statutory language of the ADA does not speak to "economic realities" but rather to "employees." Corporate employees are just that, not partners. *See Hyland, M.D.* at 798 ("There is no need to develop such a list of factors [to be considered in determining if an individual is a 'partner' or a covered 'employee'] where the individual involved is a corporate employee, for we hold that every such employee is 'covered' for purposes of the ADEA and that any inquiry respecting partnership status would be irrelevant.")

Putting taxation issues aside, four factors typically affect the choice of business form: extent of liability, centralization of management, continuity of life, and transferability of interest. Klein, W.A., et al. AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES, Foundation Press 2001 (hereinafter cited as Klein, AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES). Before the 1960s inception of professional corporations, physicians wishing to practice in small organizations could do so through a general partnership. In the 1960s, states began allowing professionals (primarily physicians) to form PCs, saving incorporated professionals significant taxation on employee retirement plans. Eaton, B.C., BUSINESS ORGANIZATIONS: PROFESSIONAL CORPORATIONS AND ASSOCIATIONS, Volume 17-17F. Matthew Bender 1998.

Whereas general partnerships did not allow for limited liability, centralization of management, continuity

of life, or free transferability of ownership, a corporation provided those features, plus the favorable taxation status. In the 1990s, states began adopting LLC and LLP statutes, allowing professionals to obtain the advantageous "pass through taxation" of partnership while maintaining limited liability for acts of other professionals in their practice.

LLCs and LLPs have attributes once exclusive to the partnership or corporate form. As a general matter, they enjoy pass-through taxation (like a partnership), limited liability for the actions of other professionals (like a corporation), centralization of management (like a corporation), continuity of life (like a corporation), and transferability of interest (like a corporation). Klein, AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES.

The Clinic elected to operate as a corporation, rather than as a partnership. It did so for a reason. It did so because it wanted the benefits flowing from the corporate structure. It now must accept the obligations as well.

IV. THE POSITION OF THE UNITED STATES AND EEOC ENGENDERS INCREASED LITIGATION, UNCERTAINTY AND EXCLUSION OF INDIVIDUALS SUFFERING FROM DISCRIMINATORY TREATMENT

A. The Purpose of the ADA & Other Remedial Legislation

The purposes of the ADA are four-fold: to eliminate discrimination against persons with disabilities, to set enforceable standards for disability discrimination, to establish the federal government's role in enforcing the Act, and to use Congressional authority to address disability

discrimination. 42 U.S.C. § 12101(b), § 12111(4), (5), § 12112(a) (1994).

Where the plain language of ADA Title I is ambiguous, the Congressional reasoning behind the Act's passage becomes more relevant, and courts should strive to effectuate the purpose of the ADA, including where relevant in connection with the question of coverage. The purpose of imposing a minimum number of employees for ADA coverage is to spare small employers the expense and inconvenience of compliance. *See Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999). When an employing entity has more than the threshold number of participants, whether members or employees, as does the Clinic corporation here, the reason for withholding coverage from small employers no longer holds force. Surely a partnership of 25 partners and 14 employees would be in a much better position to comply with the ADA's requirements than a sole proprietor with 15 employees. Accordingly, for purposes of satisfying the underlying purpose of the minimum number of employees for coverage, the question whether a particular partner or shareholder is or is not more like an "owner" has no application.

A coverage approach that prevents employers from avoiding compliance and liability solely by a nominal choice of business form effectuates the inclusive purposes of the ADA. In contrast, the coverage approach adopted by some of the circuits, such as the Seventh Circuit in *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984), where the corporate structure can be disregarded to avoid coverage, distorts the goals of the Act. The danger that transparent economic distinctions might frustrate the ADA's employment purpose requires a resolution of the

question presented by this Court that increases, rather than restricts, those persons properly covered by the employment provisions of ADA Title I and other employment anti-discrimination statutes.

B. The Position of the United States and EEOC Leads to Exclusion of Individuals Properly Protected by the Act

The position of the United States and the Equal Employment Opportunity Commission (referred to collectively as the "EEOC") also results unnecessarily in the exclusion from protection of individuals especially vulnerable to the kinds of discriminatory practices the federal employment statutes were designed to prevent. The EEOC's approach does not further the ADA's protective function, but rather restricts it. The EEOC admits its approach excludes persons from protection, which it attempts to justify by referring to them as individuals least vulnerable to such discrimination. Brief of Amicus Curiae United States and the Equal Employment Opportunity Commission ("the EEOC's Brief") at 6, 11.

The EEOC supports its willingness to exclude individuals from protection of the ADA by providing as an example an extreme scenario involving "the president, sole director, and sole shareholder of a corporation" on the one hand, and a shareholder employee who is "supervised in his work, reports to someone higher in the organization, and has little influence on the terms and conditions under which he works" on the other hand. EEOC's Brief at 11. The EEOC argues that its test would exclude the first from the definition of employer, but include the second.

Application of the EEOC's approach invites uncertainty and increased litigation because fewer cases will occur within the extremes identified by the EEOC. How often would the "president, sole director, and sole shareholder of the corporation" wish to bring a discrimination claim against the employing entity? Arguing that classifying such a person as an employee (even when in fact performing employee duties for the employing entity) would be inconsistent with the Act ignores the fact that he or she is in fact, as a matter of corporation law, an employee of the corporation.

What the EEOC fails to recognize is that the effect of excluding the first very well may have the effect of causing a lower level employee to have no protection whatsoever. The comparison between the company president shareholder and lower level shareholder employee, when neither is the one to seek protection of the Act, misses the point and demonstrates the failure of the EEOC test to support the *inclusion* of persons subject to discrimination. Indeed, when determining whether the employing entity is of sufficient size to permit an employee (including a shareholder employee) to claim the protection of the Act, the test proposed here by Wells is more consistent with "'a primary purpose of the antiretaliation provisions: [m]aintaining unfettered access to statutory remedial mechanisms.'" EEOC's Brief at 12 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

The EEOC focuses on "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." EEOC Compliance Manual (BNA) § 2, at 605:0009 (2002), quoted in EEOC's Brief at 8. This test will invite an argument in a wide range of cases that one

or more individuals within the defendant employing entity has some independence and role in managing the organization, and thereby should be excluded from a status as "employee" under the Act.

Contrary to the EEOC's assertion, subjecting more and more individuals to examination based on an economic realities test fails to further the Act's "overriding protective function." EEOC's Brief at 12. The application of an economic realities test to an ever-widening range of shareholders and possibly others with some degree of management responsibility – as the EEOC's position will permit – will engender the need to apply an economic realities test in all but the clearest cases. The overburdened district courts likely do not have the resources to accommodate the explosion of defenses asserted on this basis.

The EEOC attempts to bolster its position by pointing out that its test is similar to the economic realities test already applied by the courts in determining whether a titular partner is a bona fide partner, such that he or she should be excluded from coverage of the Act. But application of an economic realities test in such a circumstance is not precluded by the test advocated by Wells here; to the contrary, she supports it when the employing entity is a partnership. When the question is whether a partner in name is in actuality an employee of the partnership, an economic realities test will operate to *include* such an individual under the protection of the Act.[11]

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[11] The EEOC's Brief states:

> [T]he tendency in some * * * cases is to ask only whether professional corporations are analogous to partnerships or

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V. THE ECONOMIC REALITIES TEST REQUIRES THE COURTS TO ENGAGE IN UNNECESSARY COMPLEX & EXPENSIVE FACTUAL INQUIRIES

The use of an economic realities test for cases involving anything other than putative partners is not necessary. Such a subjective test is time consuming for the parties involved and for the courts. The inquiry is highly fact-dependent, requiring intensive evaluation and analysis. *See Walters v. Metropolitan Educational Enterprises,* 519 U.S. 202, 211, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997) (rejecting definition of "employee" that would make Title VII's coverage depend upon an "incredibly complex and expensive factual inquiry"); *id.* at 664 (stating that "Congress should be thought to have prescribed" an approach to the jurisdictional issue that is "impossible to administer" "only if the language could bear no other meaning").

As the Tenth Circuit explained in rejecting a similar multi-factor test:

> whether shareholder-directors are analogous to partners as if the answer to those questions automatically resolves the question whether particular shareholder-directors are employees. The tendency of that approach is to transform every professional corporation, by operation of law, into a de facto partnership, and every shareholder, without regard to circumstance, into a non-employee partner.
>
> * * * The ADA does not exclude partners from its definition of employees, so a finding that a shareholder-director should be regarded as a partner does not answer the ultimate statutory question.

EEOC's Brief at 22-23 (citations omitted). Wells agrees with this aspect of the EEOC's Brief. *See also* Restatement (Second) of Agency § 14 & comment a at 62 ("When one of the partners is * * * regularly employed in the business, he is a servant of the partnership.")

> A potentially chaotic situation is presented with partners drifting into and out of covered "employee" status, remaining partners all the while, with no one ever quite knowing who is an employee/partner and who is a 'pure' partner.

Wheeler v. Main Hurdman, 825 F.2d 257, 274 (10th Cir.), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987).

This Court also has rejected a multi-factor test on the basis that such a test would lead to a lack of predictability and an inability of companies to determine who was and was not an employee. This Court's decision in *Nationwide Mutual Ins. Co. v. Darden,* 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), adopted a common law test for distinguishing employees from independent contractors under ERISA. The *Darden* test remains useful when determining the existence of an employee relationship under common law, though the relevant factors provide little guidance "for drawing lines between people who are part of the same enterprise." *Wheeler,* 825 F.2d at 272; *accord Devine v. Stone, Leyton & Gershman, P.C.,* 100 F.3d 78, 81 n.4 (8th Cir. 1996).

In addition, the test outlined in *Darden* involved reference to a number of relatively straightforward objective factors, many of which were subject to ready determination – for example, whether the worker in question provided his own tools, the location of the work, the duration of the employment relationship, the method of payment, and the tax treatment of the hired party. 503 U.S. at 323, 327. Indeed, this Court expressly rejected an alternative approach that included consideration of the worker's "economic bargaining position" vis-a-vis the employer because it would "severely compromise the capacity

of companies * * * to figure out who their 'employees' are and what, by extension, their pension-fund obligations will be." *Id.* at 327.

The same concerns over predictability and an inability to determine in advance a company's rights and obligations under the federal employment statutes are present here. Employers are best served by a test that gives them a ready benchmark for their obligations relating to federal employment statutes, without resort to complex legal analysis of facts and to the different possible interpretations which may be placed on them.

Such predictability results from a test that addresses first and primarily whether the question of employee status arises in connection with a claim asserted by an admitted employee. If so, then the question is merely how many employees (including shareholders and any others with ownership interests) does the employing entity employ. If that number satisfies the requisite number of employees for application of the relevant federal employment statute, then the employer will know that it must comply with the obligations imposed by the relevant statute.

Such a model, superior to the imposition of an unpredictable economic realities test, would lend itself to simplified application in most cases. The difficult factual inquiries – right to control, degree of management responsibility, supposed ability to influence the employing entity, potential roles in firm governance, and the like, *see* EEOC Compliance Manual (BNA) at 605:0009 (2002); *Serapion,* 119 F.3d at 989-90 – involved in determining the bona fide nature of a titular "partner" for purposes of determining such a "partner's" right to claim protection under the

relevant Act, can be avoided. The following section proposes such a model.

VI. THE APPROPRIATE ANALYTICAL MODEL EXAMINES THE SPECIFIC PART OF THE STATUTORY DEFINITION AT ISSUE, AND RESOLVES EMPLOYEE STATUS ACCORDINGLY

A. Statement of the Model

When considering concepts of ownership, where the danger exists of having a partner's share of profits potentially conditioned upon the outcome of claims, suits and obligations generated by another partner, *see Wheeler,* 825 F.2d at 274, questions of who among the partners should be considered owners can have significant impact. On the other hand, when considering only whether an employing entity is subject to claims involving federal employment discrimination, which particular partner (or shareholder) is or is not an *owner* has little significance.

This Court should adopt an analytical model that takes into account the purpose for which bona fide *partners* are excluded from protection of federal employment statutes, yet operates to *include* rather than *exclude* those persons who are, without serious question, *employees.* This can be done by focusing on which specific part of the statutory definition is at issue at any given time, and resolving employee status accordingly.

B. The Statutory Language is not Meaningless or "Circular": An Employee is an Individual Employed by an Employer and a Bona Fide Partner is an Owner, While a Corporate Employee is an Employee

The relevant statutory definition from Title I of the ADA prohibits entities covered by the Act from discriminating against a qualified job applicant or employee with a disability because of such disability. An employer, one of the entities covered by the Act, is defined as an entity engaged in industry affecting commerce with fifteen or more employees working twenty or more weeks in the current or preceding year. An employee is defined as "an individual employed by an employer." The statutory definition of employee under several employment related statutes is virtually identical, *See* 42 U.S.C. § 2000e(f) (Title VII) ("an individual employed by an employer"); 29 U.S.C. § 630(f) (ADEA) ("an individual employed by any employer"); 29 U.S.C. § 203(e)(1) (FLSA) ("any individual employed by an employer").

While a similar definition has been termed "circular" by this and other courts, *see, e.g., Darden,* 503 U.S. at 323, it is circular only when attempting to make use of each separate term to define the other. But defining the term "*employer*" by reference to the term "individual employed by an employer" is not necessary. Each portion of the definition can be determined according to the precise question presented.

For example, if the question is whether an individual has the right to claim the protection of the discrimination acts against an admitted employer, the only question is whether the individual is an *employee*. If the question is whether an admitted employee is employed by an employing

entity, the only question is whether the employer comprises the requisite number of employees.[12]

Hence, when addressing the question of coverage, the two step inquiry is appropriate. First, what is the nature of the question, *i.e.,* is it in connection with a claim asserted by an admitted employee or rather in connection with a claim brought by a putative "owner"? If the first, and the employing entity is a professional corporation, then the question is merely how many individuals performing traditional employee duties (including shareholders and any others with ownership interests) for the corporation. Concerns over the status of the complaining party as being possibly inconsistent with that of *employee* because he or she is asserting a discrimination claim effectively against himself or herself as an *owner* are not present, and any protections against the difficulties of that situation are not warranted.

On the other hand, when the claim is asserted by a putative owner, *i.e.,* a partner, and the employing entity is the partnership of which the claimant is a part, then the question whether the partner constitutes an employee or rather an owner must be addressed. When the partner has the attributes of a true partner, such as when he or she occupies a position such as that described by Justice Powell in his *Hishon* concurrence, then the federal discrimination

[12] Similarly, if the employee status of the individual is at issue, then traditional independent contractor analysis applies to determine if the individual is an employee at all, and only if employee status is found would the inquiry move to whether the employing entity constitutes a subject employer.

statutes involved here do not apply because the partner is not an employee.[13]

[13] This approach necessarily preserves the economic realities test when addressing claims asserted by those persons holding the title of partner. When the individual is given the title of partner but none of the attendant rights and other indicia of ownership, he or she is more akin to an employee and should not be deprived of the protection of the federal employment discrimination statutes.

Bona fide partners, like independent contractors, are not employees. In *Simpson v. Ernst & Young,* 100 F.3d 436 (6th Cir. 1996), *cert. denied,* 520 U.S. 1248 (1997), the court surveyed the cases applying a totality of the circumstances test to determine when a nominal partner should be classified as a partner or employee:

> The circuits that have already judged the partner/employee dichotomy have done so by "leaving the determination of employment status to case-by-case resolution based on the totality of the circumstances," *Lilley [v. BTM Corp.],* 958 F.2d [746] at 750 [6th Cir., *cert. denied,* 506 U.S. 940, 113 S.Ct. 376, 121 L.Ed.2d 287 (1992)]; *see [Nationwide Mutual Ins. Co. v.] Darden,* 503 U.S. [318] at 323-24, 112 S.Ct. [1344] at 1348-49, 117 L.Ed.2d 581 (1992)] against the backdrop of the Uniform Partnership Act ("UPA"), that has been adopted by most states, including New York, which provides the applicable law to the agreements here under review. *See generally* N.Y. PARTNERSHIP LAW § 1 *et seq.* (McKinney 1988).

In *Wheeler v. Hurdman,* 825 F.2d 257 (10th Cir.), *cert. denied,* 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987), the Tenth Circuit analyzed the "total bundle of partnership characteristics" to distinguish partners from employees. *Id.* at 276. In *Fountain v. Metcalf, Zimc & Co.,* 925 F.2d 1398 (11th Cir.1991), the Eleventh Circuit similarly stated:

> [W]e look to the particular circumstances of the case at hand and, in so doing, we focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership.

Id. at 1400-01 (citation omitted).

(Continued on following page)

Whether the courts look to a corporation, a professional corporation or an LLC, the inquiry will be the same. The substance of the legal entity is that it is a corporation, which exists as a separate and independent legal entity. As such, all employees of the employing entity are counted for purposes of the relevant Act. Where an LLP is involved, as shown elsewhere in this brief, an economic realities test might be appropriate to determine if the partner of the LLP is by economic reality an employee with standing to bring a federal discrimination claim against the LLP employing entity.[14]

For purposes of determining whether the employing entity has sufficient numbers of employees to subject it to liability, no such test is necessary or appropriate. Here, the

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The *Simpson* court listed the following factors as relevant to the inquiry: "the right and duty to participate in management; the right and duty to act as an agent of other partners; exposure to liability; the fiduciary relationship among partners; use of the term "co-owners" to indicate each partner's "power of ultimate control;" participation in profits and losses; investment in the firm; partial ownership of firm assets; voting rights; the aggrieved individual's ability to control and operate the business; the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; the extent of that individual's employment security; and other similar indicia of ownership." *Simpson*, 100 F.3d at 443-44 (citing *Fountain*, 925 F.2d at 1400-01; *Wheeler*, 825 F.2d at 276; *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F.Supp. 144 (S.D.N.Y.1987)) (footnotes omitted).

[14] The dissent below fails to distinguish between an LLP and a general partnership in her comparison of the attributes and liabilities of a professional corporation and partnership. In fact, she makes use primarily of the LLP model for comparison. Because the reasoning that excludes partners from the definition of *employee* for purposes of counting employees for ADA coverage comes from cases addressing general partnerships, the better comparison is between a professional corporation and general partnership.

form chosen by the Clinic was that of a professional corporation. The employing entity was a corporation, not a LLC or a LLP. The employing entity maintained employment relationships with employees and shareholder employees. For purposes of determining if Wells was protected by the ADA, no further inquiry is necessary.

This two-step test provides certainty to employers regarding whether they are subject to federal employment statutes, while at the same time ensuring that protection of the statutory protections are *inclusive* rather than *exclusive*.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

CRAIG A. CRISPIN
Counsel of Record
CRISPIN & ASSOCIATES –
EMPLOYMENT LAWYERS
500 Plaza West
9600 SW Oak Street
Portland, Oregon 97223-6597
(503) 293-5759